of the *cumulo* rent among the actual occupiers. And the convenience of this procedure is said to be that it would give to the assessing authorities direct access to the actual occupiers in cases, said to be numerous, where under local statutes rates fall to be levied on the actual occupier.

As to this matter we do not feel at liberty to make any order or pronounce any judgment. We may perhaps say that, as at present advised, we see no reason why the valuation roll should not contain the figures and other information desiderated. The *cumulo* rent—the rent payable by the principal tenant, neither more nor less—must, of course, always appear in the proper column; but that being secured, we see nothing in the Act to prevent those responsible for the roll adding in the case of each sub-tenant a subordinate figure to show the value of the subject occupied by him, which figure may or may not correspond with the sub-rent which he pays. That is in fact, we are informed, the practice in Aberdeen and some other places, and it is perhaps a practice which tends to make the statute work better and make the valuation roll more useful. But the matter is not really before us, and a judgment upon it would not perhaps be within our province. Accordingly we shall, in the present case, confine ourselves to sustaining the decision of the Magistrates, adding simply a qualification that at least the name of the occupier shall appear in the proper column.

LORD STORMONTH DARLING—I concur.

The Court were of opinion that the determination of the Valuation Committee was right, but that the names of the respective occupiers should appear in the proper column.

Counsel for the Appellants—M. P. Fraser. Agents—Macpherson & Mackay, W.S.

Counsel for the Assessor — Cooper. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—M'Lennan. Agents—Macrae, Flett, & Rennie, W.S.

COURT OF SESSION.

Tuesday, March 17.

SECOND DIVISION.

[Sheriff Court at Glasgow.

DRYBROUGH & COMPANY, LIMITED *v.* ROY.

Bill of Exchange—Proof—Parole—Competency of Parole Proof of Agreement to Renew Bill during Definite Period on Certain Conditions—Bills of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 100.

In defence to an action brought by a firm of brewers against a public-house keeper for the amount due under a bill drawn by the pursuers upon the defender and accepted by him, the defender averred that the pursuers had advanced him money upon bill under an agreement, in terms of which interest was to be paid on the amount, and the bill was to be renewed from time to time during the currency of the defender's lease of his public-house, provided the business continued profitable and certain conditions were fulfilled by the defender; that for nine years the bills had been renewed from time to time under this agreement; that the bill now founded upon was a renewal of the original bills, and although *ex facie* payable three months after date was subject to the agreement as to renewal; that the defender's business had been profitable and the conditions of the agreement had been observed by him, and that his lease had still five years to run, but that the pursuers had refused to renew.

Held that under section 100 of the Bills of Exchange Act 1882 the defender was entitled to a proof by parole of the alleged agreement, being an agreement to renew for a definite period upon conditions, although the effect would be to contradict his written obligation as appearing on the face of the bill.

The National Bank of Australasia v. *Turnbull & Co.*, March 5, 1891, 18 R. 629, 28 S.L.R. 500; and *Gibson's Trustees* v. *Galloway*, January 22, 1896, 23 R. 414, 33 S.L.R. 322, *distinguished.*

The Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61) enacts as follows:—Section 100—"In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory-note, which is relevant to any question of liability thereon, may be proved by parole evidence." . . .

In September 1902 Drybrough & Company, Limited, brewers, Edinburgh raised an action in the Sheriff Court at Glasgow against Peter Roy, wine and spirit merchant, Glasgow, in which they prayed the Court to grant decree for £160 with interest at 5 per cent. from 12th January 1901 till payment.

The pursuers averred—"(Cond. 2) On 9th October 1900 the pursuers drew upon defender for the sum of £360 for value received, payable three months after said date, and the defender granted his acceptance therefor. Said acceptance is produced herewith. (Cond. 3) Said acceptance was duly presented for payment to the defender on the date on which it fell due, but he failed to pay the same, and the bill was noted for non-payment. (Cond. 4) The defender has been repeatedly requested to make payment to the pursuers of the amount of said bill, with interest thereon, but he has always craved for time, and repeatedly promised to pay the same at some future date. Pursuers are unable to wait longer for the amount of said bill, and as defender, although repeatedly applied to, has failed to pay the same the present action has been rendered necessary."

The defender admitted that the bill referred to had not been paid by him, and that he had requested the pursuers to

grant delay in terms of the contract after mentioned. He "explained that the sum sued for is the balance of money advanced by pursuers to defender on or about 27th October 1893, 21st May 1898, and 21st January 1899, in connection with the purchase and alteration of a public-house in Port Dundas Road, Glasgow; that it was contracted between the parties that till repayment of said loan defender should purchase from pursuers and pursuers should sell to defender all beer required by him for retailing in said public-house, and that so long as defender continued to purchase beer from pursuers as aforesaid, and the business continued profitable, the pursuers should be bound to renew from time to time the bill originally accepted by the defender as an acknowledgment for said loan. In terms of said contract the bill was renewed on various occasions, but on or about 14th May 1901 the pursuers requested defender to grant a trust-deed conveying his whole estates including his interest in said public-house business to a nominee of the pursuers, which defender refused to do, and in consequence of defender's refusal pursuers in breach of said contract declined to renew the bill founded on, which is a renewal of the original bill granted by defender for said loan. Defender has all along purchased from pursuers all beer required by him in terms of the contract.

The pursuers pleaded, *inter alia*—"(3) The defence is irrelevant, and the defender is not entitled to have his averments remitted to probation. (4) In any event defender's averments can only be proved by the writ or oath of the pursuers."

The defender pleaded—"The pursuers having contracted to renew said bill as condescended on, the action should be dismissed, with expenses."

On 18th November 1902 the Sheriff-Substitute (BOYD) pronounced the following interlocutor:—"Finds that the pursuers sue the defender for £360, the sum contained in a bill, dated 9th October 1900, drawn by the pursuers upon the defender for value, payable three months after date, and accepted by the defender; the bill was presented for payment on the due date and the defender failed to pay, and the bill was noted; the defender admits that the contents were lent to him by the pursuers, but that it was contracted that while the defender bought all beer used by him from the pursuers, and the business remained profitable, the pursuers would renew from time to time, and that the pursuers now refuse to renew because the defender refuses to convey his business to the pursuers' nominee; he says he has bought all beer from the pursuers: Finds the defences irrelevant, and repels these accordingly; decerns as libelled."

The defender appealed to the Sheriff (BERRY), who by interlocutor dated 15th January 1903 adhered.

The defender appealed to the Court of Session, and lodged a minute craving leave to amend the record by adding the following statement of facts:—"(1) In or about the month of October 1893 the defender was informed by John Bathgate, who was agent in Glasgow for the pursuers and John A. Bertram & Company, that these firms had at their disposal the rights under a lease expiring at Whitsunday 1900 of the said public-house business. The said business had been carried on by Hugh M'Intyre, who had been financed by the said firms. The said John Bathgate proposed to defender that he should go into the business, and acting on behalf of and as authorised by the said firms undertook that they would provide all necessary funds if the defender applied for and obtained the licence in his name. It was then agreed between the defender and the said John Bathgate that interest at 5 per cent. should be paid on the amount in said bills, and that although they were taken payable three months after date, they were to be renewed from time to time when due during the currency of the lease so long as the said business continued to be profitable and interest was paid on the bills and the defender took all his supplies from pursuers and the said Bertram & Company. Both of said firms were well aware of and authorised this arrangement, and it was on this footing that defender entered into the transaction with them. The defender accordingly obtained a transfer of the licence, and on or about 27th October 1893 he accepted two bills for £320, 16s. 8d. each. The said Hugh M'Intyre, who endorsed his licence over to the defender, received no part of the said sum, the amount of his indebtedness to the pursuers and Bertram & Company exhausting the same. In pursuance of said arrangement the said bills have been renewed regularly from 27th January 1894 when due down to 27th January 1901, when for the first time the said firms refused to renew said bills. (2) Shortly before Whitsunday 1898 the defender and pursuers and Bertram & Company arranged to have the premises altered if a new lease could be obtained. This lease was obtained for ten years from Whitsunday 1898, and a further sum of £125 was added to the bills to meet the alteration, and it was then arranged as before that the total sum in the bills should remain a loan during the currency of the new lease while supplies were taken and the business was profitable as originally agreed. The business has been profitable and the conditions have been fulfilled. The agreement was entered into by Mr Andrew Drybrough acting on behalf of the pursuers and within the scope of his authority. The pursuers are called on to produce the correspondence between the said John Bathgate and A. F. Wyllie and them which took place in regard to the said arrangements."

The Court ordered the pursuers to lodge answers to the proposed statement of facts, and the pursuers by minute lodged the following answers:—"(1) Admitted that in October 1893 the defender purchased from M'Intyre's trustee the goodwill and lease of the business referred to for £641, 13s. 4d., and that the pursuers along with

John A. Bertram & Company, Limited, advanced the said price and took two bills therefor of equal amounts at three months' date. The said sum of £641, 13s. 4d. was paid by defender to Mr R. B. M'Caig, the trustee on M'Intyre's estate. *Quoad ultra* denied. (2) Admitted that during the summer of 1898 the defender made alterations on the premises and obtained a lease for ten years from Whitsunday 1898, and that the pursuers, at defender's request, lent him a sum of £50 in June 1898 and a further sum of £75 in or about February 1899 to enable him to pay the cost of said alterations, and that these sums were added to the bill. Explained that the bills have in part been renewed from time to time, and that the sum sued for is the balance due on said loans. Admitted that the interest on said bills was to be punctually paid, but explained that said interest is more than two years in arrear. *Quoad ultra* denied. Explained that there is no such correspondence as that called for."

Argued for the defender and appellant—The facts averred in defence in this action by the defender referred to a bill of exchange. Under section 100 of the Bills of Exchange Act 1882 any such facts relevant to the question of liability could be proved by parole evidence. The cases of the *National Bank of Australasia* v. *Turnbull & Co.*, *infra*, and *Gibson's Trustees* v. *Galloway*, *infra*, founded on by the pursuers, were quite distinct from the present. In neither of them was there an averment by the defenders alleging postponement of payment for a definite period.

Argued for the pursuers and respondents—Even if the amendment was allowed no relevant defence had been stated to the claim on the bill. A verbal contract of so indefinite a nature as that stated in the defences was not effectual to invalidate the bill as a document of debt. An agreement of such an indefinite nature could not be proved by parole when opposed by a written document like the bill. Section 100 did not apply to a case of this kind. The case was ruled by the decisions in the *National Bank of Australasia* v. *Turnbull & Co.*, March 5, 1891, 18 R. 629, 28 S.L.R. 500, and *Gibson's Trustees* v. *Galloway*, Jan. 22, 1896, 23 R. 414, 33 S.L.R. 322.

LORD TRAYNER — The pursuers in this action sue the defender for payment of the amount contained in a bill drawn by them upon and accepted by him. The bill sued on is admittedly a renewal of a bill granted some years ago, and which has been renewed by the parties from time to time under an arrangement which is set out on the record. The defender does not deny that he is liable for the amount contained in the bill, but he avers that he is not bound to pay it, and that the pursuers have no right to enforce payment at present in respect of the arrangement made when the original bill was granted. Shortly stated, the arrangement averred by the defender is this, that the bill was originally granted as a means of financing the defender and enabling him to purchase a spirit dealer's business; that the pursuers undertook to renew the bill from time to time as it or the renewals of it fell due, provided that (1) the defender took from the pursuers all the beer he required for retail in his business, and (2) that he regularly paid interest on the amount of the debt. This arrangement, it is further averred by the defender, was to hold good during the currency of the lease of his premises (which has not expired) and whilst the business continued profitable. I consider this a relevant defence to the pursuers' present claim, and the question is, how can that defence be proved? Prior to the passing of the Bills of Exchange Act 1882 it is certain that such a defence could only have been proved by the writ or oath of the pursuers, but the defender maintains that he can now prove it by parole. I think he is right. By the 100th section of the Act I have cited it is provided that "In any judicial proceeding in Scotland any fact relating to a bill of exchange . . . which is relevant to any question of liability thereon may be proved by parole evidence." The facts averred in regard to the alleged agreement are relevant to the question of the liability upon the bill of exchange founded on, and may therefore be proved by parole. It was said that the statute did not apply here because the defender did not deny his liability on the bill. It is true he does not deny the debt, nor his ultimate liability to pay the same. But he does deny his liability to make payment of it now, and that is the question now to be determined. It is a question of present liability, and the statute is not confined to questions of ultimate liability. It provides for the proving of any fact relevant to (that is, bearing upon) "any question of liability." The pursuers maintained that it had already been decided on a construction of the 100th section of the Bills of Exchange Act that parole proof of such facts as are here alleged was not competent, and referred to the cases of the *National Bank of Australasia* (18 R. 629) and *Gibson's Trustees* (23 R. 414). A consideration of these cases, however, will show that nothing was decided in either of them contrary to the view I have expressed. In the latter case (*Gibson's Trustees*) the question now before us so far from being decided was expressly reserved. Lord M'Laren (in whose opinion all the other Judges concurred) said—"The question may hereafter arise whether it would be open to an obligant to prove a verbal agreement that a bill should be renewable for a definite time, or that the debt should subsist for a definite time, the bill being treated as a mere security for its ultimate payment. I offer no opinion on the competency of proving such an agreement qualifying the obligation on the bill." That is precisely the question which has now arisen, and on which Lord M'Laren offered no opinion. The decision in *Gibson's* case therefore decides nothing against the view I have expressed that parole proof is competent to establish facts qualifying an obligation on a bill by an agreement to renew it for a definite time.

As regards the case of *The National Bank of Australasia*, I repeat the observation that it did not decide that such an agreement as we have here alleged might not be proved by parole. What was decided there was that the defence was irrelevant and therefore could not be remitted to any kind of probation. It is true that in the course of his opinion in that case the Lord President stated certain views entertained by him as to the construction of the 100th section of the Bills of Exchange Act. But these views were not necessary to the decision pronounced, and were dissented from by Lord Adam. The judgment pronounced was a unanimous judgment, which it could not have been had it turned on the construction of the 100th section. Lord Kinnear in his opinion does not allude to that section or offer any opinion as to its construction. I think I am right therefore in saying that there is no decision contrary to allowing such a proof as I think the defender is entitled to in this case. I notice that in the case I have referred to it is made subject of remark that to allow the apparent obligant on a bill of exchange, by parole to contradict the writ on which he appeared as obligant, would be to allow a proof by parole to contradict or modify his written obligation. In the ordinary case that would not be allowed. But the Bills of Exchange Act has, in my opinion, introduced an exception to that general rule where the question involved is one of liability on a bill of exchange. This seems to be assented to by the Lord President, who says that an acceptor of a bill of exchange (and therefore on the face of it the debtor) may prove by parole that he is not the debtor, but had only granted the bill as an accommodation to the drawer. But that is nothing more nor less than contradicting by parole the written obligation constituted by the bill. If the entire obligation *prima facie* constituted by the bill may be thus competently contradicted by parole, I see no reason for refusing parole proof that liability to pay the debt which, according to the writ, was to emerge at three months date was not to emerge or be enforceable until a date more remote.

I think therefore that the interlocutor appealed against should be recalled and the case remitted to the Sheriff with instructions to allow the parties a proof of their averments *pro ut de jure.*

LORD MONCREIFF—I agree with Lord Trayner in his exposition of the scope and meaning of the 100th section of the Bills of Exchange Act 1882, and in his analysis of the cases of *The National Bank of Australasia* and *Gibson's Trustees.* It is remarkable that although the Act was passed twenty years ago this section has been so little expiscated by decisions of the Court. In the first-named case I was Lord Ordinary, and allowed a proof before answer. But my interlocutor was recalled by the Inner House; and if it had been recalled on the ground that I was wrong in my views as to the scope of the 100th section, I should have held that we were bound by the decision. But the Inner House did not proceed on that ground (although the Lord President and Lord M'Laren expressed views to the opposite effect), but on the ground that the averments made by the defenders were irrelevant. I therefore feel at liberty to repeat and act on the views which I stated in the opinion attached to my interlocutors in that case, and which I still hold.

As regards the case of *Gibson's Trustees*, Lord Trayner has pointed out the reasons why the defence was held to be irrelevant. The defender in that case attempted to escape liability for the amount due under a promissory-note by averring that there was an agreement that the amount should only be repaid when convenient to the debtor, which meant simply postponing repayment to an indefinite date. I should have come to the same conclusion as the First Division. In the present case the defender has made specific averments to the effect that there was a verbal agreement between himself and the pursuers that payment of the bill should not be enforced for a definite period, namely, during the currency of the current lease, as long as interest was paid on it and certain other conditions fulfilled. These conditions the defender avers he has hitherto fulfilled. The pursuers deny that there was any such agreement between the defender and themselves. But the fact that this bill was first granted nine years ago, and has been renewed from time to time, gives some support to the defender's statement that there was such an arrangement between parties. I may add that we are dealing with the immediate parties to the bill. I am therefore of opinion that the defender's appeal should be sustained and the case sent back for proof.

LORD JUSTICE-CLERK—I entirely concur in the judgment proposed and the reasons assigned for it by your Lordships.

LORD YOUNG was absent.

The Court sustained the defenders' appeal against the interlocutors of the Sheriff-Substitute and the Sheriff, and remitted to the Sheriff to proceed.

Counsel for the Pursuers and Respondents—Young—Gunn. Agent—Louis H. Gow, Solicitor.

Counsel for the Defenders and Appellants—W. Thomson—W. T. Watson. Agent—W. J. Lewis, S.S.C.